92-946

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER, 1992, Term

OSCAR LEE WILKINS, Plaintiff/Petitioner,

VS.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant/Respondent.

Petition for Writ of Certiorari

To the District Court of Appeals, First District,
State of Florida.

PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

ISSUES FOR REVIEW

Whether the District Court of Appeals for the First District, State of Florida, erred in affirming, by a per curiam order, the Trial Court's entry of Judgment N.O.V. not withstanding the jury verdict in favor of the Plaintiff in this Federal Employer's Liability Act (45 USC Sec. 51, et seq) action and its award of damages in the amount of $450,000.00?

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JURISDICTION

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 10 1 (b) and 28 USC 1257 (a), in that the District Court of Appeal, First District, State of Florida, entered a Per Curiam Order on June 1, 1992, and denied Petitioner's Motion for Rehearing on July 2, 1992, affirming the Final Judgment for Defendant entered by the Circuit Court of Escambia County, Florida, on July 1, 1991. No appeal lies from a Per Curiam order of the Court of Appeal to the Florida Supreme Court.

FEDERAL STATUTES

Federal Employers Liability Act, 45 USC Sec. 51, et seq.

STATE RULES

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* * *

2. Discretionary Jurisdiction. The Discretionary Jurisdiction of the Supreme Court may be sought to review:

A. Decisions of District Courts of Appeal that:

(i) Expressly declare valid a state statute;

(ii) Expressly construe a provision of the State and Federal Constitution.

(iii) Expressly affect a class of constitutional or state officers;

(iv) Expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of Law;

(v) Pass upon a question certified to be of great public importance.

(vi) Are certified to be in direct conflict with decisions with other District Courts of Appeal.

Rule 9.120 Discretionary Proceedings to Review Decisions of District Courts of Appeal (a) applicability. This rule applies to those proceedings which invoke the discretionary jurisdiction of the Supreme Court described in Rule 9.030 (a)(2)(A).

STATEMENT OF THE CASE

The Plaintiff/Petitioner, Oscar Lee Wilkins, had been employed by the Defendant/Respondent, Burlington Northern Railroad Company, since 1970, as a machinist. On October 21, 1987, the Plaintiff was attempting to turn a valve which was sticky and malfunctioning. This valve controlled the flow of fuel from a fuel tank through a pump and hose. The valve broke. The resulting, violent twisting caused him to suffer ruptured discs in his lower back. The proof at trial showed that the Defendant had installed the valve several years prior to the incident and at no time during that time ever inspected or made any repairs to the valve. The Defendant, Burlington Northern Railroad Company, failed to post any instructions as to the operation of the valve or pumping system and failed to train its employees, such as the Plaintiff in the proper use and/or maintenance of the valves.

Plaintiff filed his Complaint in the Circuit Court of Escambia County, Florida, and in that Complaint alleged the grounds necessary for an action brought pursuant to the Federal Employers Liability Act, 45 USC 51, et seq. The trial of the cause commenced before the Honorable Lacey A. Collier, Judge, on April 10, 1991, and continued thereafter for two (2) days, at which time the jury announced it had reached a verdict in favor of the Plaintiff awarding total damages in the amount FIVE HUNDRED THOUSAND AND NO/100 ($500,000.00) DOLLARS, and finding that the Plaintiff was five (5%) percent contributorily negligent with a result that a verdict was rendered in favor of the Plaintiff against the Defendant in the amount of FOUR HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($475,000.00) DOLLARS.

On June 25, 1991, the trial court entered a Final Judgment for Defendant, said Order being officially entered on the record on July 1, 1991. In this final Judgment the trial court held that the Plaintiff had failed to establish any negligence on the part of the Defendant which resulted in injury to the Plaintiff.

The Plaintiff appealed this decision to the District Court of Appeal, First District, State of Florida, which entered a Per Curiam Order

on June 1, 1992, affirming the trial court's Order. A Petition for Rehearing was filed on June 15, 1992, which was denied by the District Court of Appeal on July 2, 1992.

Under Florida laws, the per curiam affirmance of the trial court's decision effectively denies jurisdiction for any further appeal to the Florida Supreme Court. That Court is empowered to grant a discretionary appeal only in cases where the District Court of Appeal has rendered an opinion. Since no opinion was entered by the District Court of Appeal for the State of Florida, no jurisdiction, discretionary or otherwise, lay to the Supreme Court of Florida. Thus, the only further review available to the Plaintiff/Petitioner, Oscar Lee Wilkins, at this stage of the proceedings, is to the United States Supreme Court.

ARGUMENT

In granting Judgment N.O.V. for the Defendant, Burlington Northern Railroad Company, in this cause, the trial court erred in invading the province of the jury.

The Plaintiff proved in the trial of this cause that he injured his back while attempting to turn a valve which would increase or decrease the flow of fuel through a pump and hose. The fuel was used to operate locomotives and other track vehicles owned and operated by the Defendant.

The valve in question was operated by grasping the handle and squeezing it to release a trigger. Apparently, the valve had a type of ratchet system. The valve stuck and then the Plaintiff applied additional pressure with the result that a one-half (1/2") inch steel pin shattered. This resulted in a violent twisting motion to the Plaintiff causing serious injury to his back.

The lone service man whose responsibility it was to inspect and repair this valve was located in Birmingham, Alabama. The Plaintiff worked at the Defendant's yard at Pensacola, Florida.

No one ever instructed the Plaintiff in how to operate the valve or pump system, even though it was his job to operate it. In fact, the Plaintiff's alleged immediate supervisor was not even employed in the Pensacola yard. This supervisor worked at the Defendant's yard in Birmingham, Alabama. For some inexplicable reason, this supervisor would communicate with the Plaintiff through a separate individual who was employed as a lead carman. In the final analysis, there was no appropriate direct supervision over the Plaintiff by

the Defendant. Any supervision would be described as haphazard at best.

Thus, at trial the Plaintiff was able to prove that:

1. The Defendant had failed to train the Plaintiff in anyway the operation of the valves in question;

2. The Defendant had installed this valve in approximately 1981, and had failed at anytime after that to inspect the valve or repair it;

3. The Defendant had a responsibility to properly train its employees;

4. The Defendant had a duty to inspect and maintain its equipment;

5. The Defendant's employee in charge of inspection and maintenance of this valve worked at a yard two hundred (200) miles away;

6. The Plaintiff's immediate supervisor worked at the same yard two hundred (200) miles away;

7. The valve malfunctioned by being sticky and difficult to turn according to all employees who testified at trial; and

8. The Plaintiff suffered serious, permanent injury to his back when the valve failed while he was attempting to operate it.

In summary, the Plaintiff proved ample grounds of negligence on the part of the Defendant and the trial court's ruling setting the jury verdict aside does not comport with the Law. It has long been held in FELA cases where questions of the Defendants' negligence exist, the decision should be left to the jury. Bailey v. Central V.R., Inc., (1943) 319 US 350, 87 L.Ed. 1444, 62 S.Ct. 1062.

It is for the jury to determine whether or not, under FELA, an employer's conduct measures up to reasonable standards under the circumstances. Wilkerson v. McCarthy, (1949) 336 US 53, 93 L.Ed. 497, 69 S.Ct. 413.

Where the proof justifies a conclusion that the employer's negligence played some part in producing the injuries for which damages are sought, a jury question is presented on the issue of causation. Rogers v. Missouri P.R. Company, (1957) 352 US 500, 1 L.Ed.2d 493, 77 S.Ct. 443.

The issue of proximate cause must go to the jury if there is substantial evidence that a violation of FELA is a contributing proximate cause of injury. St. Louis S.R. Company vs. Ferguson, (1950 CA 8 Mo) 182 F2d 949.

The railroad has a duty to make reasonable inspections of its premises in order to discover and repair any defects therein. Webb v. Illinois C R. Company, (1957) 352 US 512, 1 L.Ed.2d 503, 77 S.Ct. 451. It is a jury issue whether or not the Defendant has been negligent in failing to properly inspect. Shelton v. Thomson, (1946 CA 7 ILL), 157 F2d. 709; (Alabama and V. R. Company v. Fountain, (1927), 145 MISS 515, 111 So. 153, Cert.den. 274 US 759, 71 L.Ed. 1338, 47 S.Ct. 769).

It is for the jury to determine whether or not under FELA the Defendant had knowledge, actual or constructive, of alleged inadequacies of equipment which caused the injury. Urie v. Thompson, (1949) 337 US 163, 93 L.Ed. 1282, 69 S.Ct. 1018.

In the case below the decision was entered based on a question of Law rather than fact and thus, this Court has jurisdiction to grant a Writ of Certiorari. Union P.R. Company v. Huxol, (1918), 245 U.S. 535, 62 L.Ed. 455, 38 S.Ct. 187; Chicago, M & S P.R. Company vs. Coogan, (1926), 271 U.S. 472, 70 L.Ed. 1041, 46 S.Ct. 564.

In passing upon a motion for directed verdict or judgment N.O.V., a trial may grant such a motion only upon grounds which would sustain a Motion for Directed Verdict. Dickerson v. Franklin N.A.T. Ins. Company, (1942 CA 4 W.Va), 130 F2d. 35.

A trial judge may grant judgment in N.O.V. only where as a matter of Law the evidence is insufficient to sustain a Claim. National Car Rental System, Inc., v. Better Monkey Grip Company, (1975 CA 5 Tx) 511 F.2d 724 cert.den. 423 U.S. 894, 46 L.Ed. 2d 126 96 S.Ct. 193.

Judgment N.O.V. will only be granted where there is such complete absence of evidence to support a verdict that jury's findings could only be a result of shear summarize and conjecture. Howes v. Great Lake Press Corp., (1982, Ca.2 NY) 679 F2d. 1023.

A trial court should only deny a Motion for Judgment N.O.V. where evidence along with all inferences to be reasonably drawn therefrom when viewed in a light most favorable to party opposing such motion is such that reasonable men in fair and impartial exercise of their judgement may reach different conclusions. Sparrow v. Yellow Cab Company, (1959, CA 7 Ill) 273 F2d. 1.

CONCLUSION

The trial court erred in supplanting its view of the evidence for the findings of the jury in the cause. The Plaintiff/Petitioner, Oscar Lee Wilkins, is entitled to recover his judgment from the Defendant/ Respondent, Burlington Northern Railroad Company, in the amount of FOUR HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($475,000.00) DOLLARS. The Plaintiff/ Petitioner, Oscar Lee Wilkins, respectfully requests this Court grant this Petition for Writ of Certiorari and enter such further orders as may be appropriate.

Respectfully submitted,

/s/ JAMES F. SCHAEFFER, JR.
Counsel of Record for Plaintiff/Petitioner
5108 Stage Road, Suite 2
Memphis, Tennessee 38134
(901) 382-1212

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served upon the following by U.S. Mail postage prepaid:

Clerk of the Court
United States Supreme Court
One First Street, Northeast
Washington, D.C. 20543

Honorable Robert P. Gaines
BEGGS & LANE
Blount Building, Seventh Floor
Pensacola, Florida 32501

DONE, this 5th day of November, 1992.
/s/ JAMES F. SCHAEFFER, JR.

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, FLORIDA

OSCAR LEE WILKINS,
Plaintiff,

v.

Case No. 88-2604
Division A

BURLINGTON NORTHERN RAILROAD COMPANY, a foreign corporation,
Defendant.

FINAL JUDGMENT FOR DEFENDANT

At the trial of this cause the court took under advisement the motion for directed verdict made by the defendant at the close of the plaintiff's evidence and again after all evidence had been presented. The court has received written argument and has heard oral argument from counsel for the parties on that motion. The court is aware of the rule exemplified by such cases as Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443 (1957) that it is not necessary for a plaintiff bringing suit under the Federal Employers Liability Act to establish that negligence on the part of the railroad was the proximate cause of his injury. Rather, the burden on the railroad employee is to prove that negligence of the employer played any part, however small, in the injury. However, neither that case nor any subsequent case has eliminated the requirement that the plaintiff present evidence from which fair-minded jurors could reasonably conclude that there was negligence on the part of the employer that played a part in causing the injury. The cases have not repealed the rule that it is necessary for injury to be reasonably foreseeable from the conditions in order for a case of negligence to be made.

In this case the undisputed evidence was that no supervisory employee of the plaintiff had instructed him to use the method that he was attempting to use to increase the flow of fuel through the supply hose. His supervisor testified that he never touched the valve that the plaintiff was attempting to turn when he sustained his injury. The water service mechanic who installed and maintained

the pumping system testified that the valves that the plaintiff had turned and was turning at the time of his injury had no effect on the flow of fuel through the small hose.

It being undisputed that the plaintiff had not been instructed by any supervisor to use the method that he was using, that he was aware of the appropriate method and that there was no reason for any supervisory personnel to expect the plaintiff to attempt to turn the valve in question, it is the conclusion of the court that there was no evidence from which a reasonable jury could conclude the negligence of the defendant played a part in causing the plaintiff's injury. The court therefore concludes that the defendant's motion for directed verdict should have been granted. Therefore, it is.

ORDERED that the motion of defendant for directed verdict taken under advisement at trial is hereby granted, that plaintiff take nothing by his suit against defendant and that defendant do have and recover of and from plaintiff its taxable costs to be entered by further order of the court.

DONE AND ORDERED at Pensacola, Florida, on 25 June, 1991.

/s/ L. A. Collier
CIRCUIT JUDGE

Copy furnished to
Gerald A. McGill, Esquire;
Eugene Williams, Esquire; and
Robert P. Gaines, Esquire

APPENDIX B

MANDATE

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Circuit Court for Escambia County

WHEREAS, in that certain cause filed in this Court styled:

OSCAR LEE WILKINS

v. Case No. 91-2223

BURLINGTON NORTHERN RAILROAD COMPANY, a foreign corporation Your Case No. 88-2604

The attached opinion was rendered on June 1, 1992

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Joanos

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 20th day of July, 1992.

/s/ Karen Roberts

Deputy Clerk, District Court of Appeal of Florida, First District

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

OSCAR LEE WILKINS,
Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a foreign corporation,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-2223.

Opinion filed June 1, 1992.

Appeal from the Circuit Court for Escambia County.
Judge Lacey Collier.

Gerald A. McGill, of McGill & McDavid, Pensacola, and Eugene Williams of Williams & Miller, Memphis, Tennessee, for appellant.

Robert P. Gaines, of Beggs & Lane, Pensacola, for appellee.

PER CURIAM.

BOOTH, BARFIELD, and KAHN, JJ., CONCUR.

APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 2, 1992

CASE NO: 91-02223

L.T. CASE NO. 88-2604-CA-01

Oscar Lee Wilkins, v. Burlington Northern Railroad Company

Appellant(s) Appellee(s).

ORDER

Motion for rehearing, filed June 15, 1992, is DENIED.

By order of the Court

JON WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Gerald A. McGill

Robert P. Gaines

/s/ Laurie Black
Deputy Clerk

Supreme Court, U.S.
FILED
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No. 92-946

IN THE

Supreme Court of the United States

October Term 1992

OSCAR LEE WILKINS,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF IN OPPOSITION TO PETITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

May a trial court direct a verdict in favor of the defendant in a suit brought under the Federal Employers' Liability Act, Section 51, Title 45, United States Code?

PARTIES

1. Oscar Lee Wilkins, Petitioner.

2. Burlington Northern Railroad Company, Respondent.

CORPORATIONS RELATED TO RESPONDENT

Burlington Northern Inc. is the parent company of Respondent Burlington Northern Railroad Company. The partially owned subsidiaries of Respondent Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
TTX Company
The Wichita Union Terminal Railway Company

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IN THE

Supreme Court of the United States

October Term 1992

No. 92-946

OSCAR LEE WILKINS,
Petitioner,

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BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District

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CITATION OF OPINION BELOW

Neither the final judgment of the trial court nor the opinion of the District Court of Appeal of Florida, First District, has been officially published. Therefore there is no citation for either of them.

GROUND FOR JURISDICTION

The only possible basis for jurisdiction in this court on writ of certiorari would be that found in Rule 10.1(b) or (c) of the rules of this court. This court does not have jurisdiction because the state court has not decided a federal question in a way that conflicts with the decision of another state court of

last resort or of a United States court of appeals, nor has a state court decided an important question of federal law which has not been settled by this court, nor has it decided a federal question in a way that conflicts with applicable decisions of this court..

STATUTORY PROVISION

This action was brought under the provisions of the Federal Employers' Liability Act, Sections 51-60, Title 45, United States Code.

STATEMENT OF THE CASE

Respondent disagrees with the statement of the facts contained in petitioner's brief. The facts revealed by the record are as follows.

Oscar Lee Wilkins was employed as a machinist by Burlington Northern Railroad Company. He bid for a position at the railroad's yard in Pensacola, Florida, and was awarded that position because of his seniority. His duties included performing maintenance work on diesel electric locomotives, including fueling them. His next superior in his craft was located in Birmingham, Alabama, but he was under the general supervision of the lead carman in the Pensacola yard, even though the carman was in a different craft and seniority group.

In the area in which Wilkins worked there was a storage tank of diesel fuel. A system of pumps, valves and hoses permitted the tank to be supplied with fuel from a railroad tank car or a tank trailer. There was a hose that could be used to pump diesel fuel from a railroad tank car into the storage tank, but it was not used because the fuel always came in by truck rather than by rail tank car.

There was a large pipe that ran from the storage tank into a pump. That pump was used to deliver fuel to the service track on which locomotives would be located for maintenance and fueling.

There was also a small auxiliary hose that permitted removal of fuel from the storage tank to supply other machinery. That hose was designed for gravity flow, although a pump could be used to increase pressure.

The pump and valves that could be used to direct the flow of fuel were located inside a building to which Wilkins had access. Wilkins had not been told to make any adjustments in the valves because his job involved only the removal of fuel from the storage tank. A change in the valves would be required only in the event that fuel was delivered by a railroad tank car, a condition that never occurred.

The pump and valve system was not maintained by Wilkins. It fell within the jurisdiction of a water service mechanic, Charles Smith.

On the day that Wilkins claimed to have been injured, he was instructed by the lead carman to provide some diesel fuel to a brush cutter being operated by another railroad employee. Wilkins said that in response to a request by that employee to make the fuel flow faster, he attempted to turn one or more of the valves in the pump house. He said that one of the valves was extremely difficult to turn, and that in the process of applying force to the valve the center pin about which it turned broke, causing him to start to fall backwards. Although he did not fall to the floor, he said that he injured his low back.

Charles Smith, the mechanic whose duties included maintenance of the pump and valve system, testified as to its operation. His testimony was not contradicted. Smith said that

after he learned that Wilkins was claiming to have been injured, he examined the valve in question. He found that the pin going through the top of the valve to which the handle was attached was broken. He said that in order to turn the valve, it was necessary to remove a positioning pin from a ratchet by squeezing the handle. The normal travel of the valve is 180 degrees. The open and closed positions of the valve were indicated by information stamped into the top of the valve stem.

When he made his inspection after the reported injury, Smith said that he found that the positioning pin was bent to the point that it would not go into the ratchet, the spring that set that pin was no longer working and the center pin was broken.

The function of the valve that Wilkins said he broke was to permit the pumping of diesel fuel from a railroad tank car into the storage tank. In order to perform that operation, it was necessary to close that valve. At all other times the valve would be open.

Wilkins could have reached his supervisor in Birmingham by telephone. If he had a question about the operation of the pumping system, his supervisor would have referred him to Smith. Wilkins did not attempt to consult with anybody when he decided to try to make the fuel flow faster.

At the conclusion of the plaintiff's case and again after all evidence had been presented at trial, Burlington moved for a directed verdict. The trial court took those motions under advisement and submitted the case to the jury. After the jury returned a verdict for Wilkins, the trial court received written and oral argument on the motion for directed verdict. It granted the motion and entered judgment for Burlington. Wilkins took an appeal to the District Court of Appeal of Florida, First District, which affirmed the judgment without writing an opinion. Wilkins filed a petition for rehearing that

was denied. He thereby exhausted his appellate remedies in Florida.

In the final judgment (petitioner's appendix A) the court recognized the rule that it is not necessary for a plaintiff bringing suit under the Federal Employers' Liability Act to establish that negligence on the part of the railroad was the proximate cause of the employee's injury. The court recognized the fact that the employee's burden is only to establish that negligence of the employer played any part, however small, in the injury. However, the court pointed out that the undisputed evidence at trial was that Wilkins had not been instructed by any supervisor to use the method that he was using, that Wilkins was aware of the appropriate method and that there was no reason for any supervisory personnel to expect Wilkins to attempt to turn the valve in question. Therefore, there was no evidence from which a reasonable jury could conclude that negligence of the railroad played a part in causing injury to Wilkins. The court concluded that the railroad's motions for directed verdict should have been granted.

SUMMARY OF THE ARGUMENT

There is no conflict between the decision in the state court and the decision of any other court, state or federal. It is not the function of this court to decide cases that affect only the parties to a particular case. The state courts applied the proper rule of law as exemplified by *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957) and *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959).

ARGUMENT

The petition for writ of certiorari should be denied. There is no conflict between the state court decision in this case and a decision from another state court of last resort, a United States court of appeals or this court for two reasons. In the first place, there is no published opinion that can be used as precedent. Secondly, the order of the trial judge shows that the state court has followed the precedents of this court in this case.

Under Florida procedure, the decision of the District Court of Appeal of Florida, First District, is not subject to review by the Florida Supreme Court since it merely affirms the trial court's judgment without opinion. The ruling of the district court of appeal is therefore that of the state court of last resort. Since all the ruling says is, "Affirmed," it cannot possibly be in conflict with any other decision.

The order of the trial court recognizes the rule of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), which holds that under the Federal Employers' Liability Act proximate causation is not required. The railroad employee need prove only that negligence of the employer played a part, no matter how small, in the injury. The trial court also recognized the fact that the employee still has the burden of producing evidence from which a jury can lawfully conclude that the employer's negligence played a part in causing the injury. The trial court recognized the fact that one aspect of negligence is that it is reasonably foreseeable that injury will occur from the condition or conduct in question.

The trial court pointed to the fact that the undisputed evidence was that no supervisory employee of the plaintiff had instructed him to use the method that he was attempting to use to increase the flow of fuel through the supply hose. The

employee's supervisor testified that he never touched the valve that the plaintiff was attempting to turn when he sustained his injury. The mechanic who installed and maintained the pumping system testified that the valves that the plaintiff had turned and was turning at the time of his injury had no effect on the flow of fuel through the small hose. The trial court properly concluded on this undisputed evidence that there was no reason for the railroad to expect the plaintiff to attempt to turn the valve in question. Therefore there was no duty on the part of the railroad to instruct the plaintiff not to attempt to turn that valve.

Although directed verdicts may be rare in FELA cases, a directed verdict was appropriate in this case. Even after *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), this court has approved the action of a trial court in granting a motion for summary judgment. *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959). As this court pointed out in that case (361 U.S. at 140):

> The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record. In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was "no evidence of prior occurrences of the kind here under consideration" in the record. Indeed, unless these 11 words of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous.

The only principle of law involved in the decision of the state court of last resort in this case is that in appropriate circumstances a directed verdict may be granted for the employer in an FELA case. That decision does not conflict with the decision of any other state court of last resort, of a United States court of appeals or of this court. If this court should grant the petition for writ of certiorari, it would be violating its principle set out in such cases as *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955) that this court does not decide cases that affect only the immediate litigants. The petition for writ of certiorari should be denied.

CONCLUSION

This case does not fit within any of the reasons set forth in Rule 10 of this court for the granting of a writ of certiorari. The decision of the state court of last resort that petitioner seeks to have reviewed is not in conflict with the decision of any other state court of last resort, a United States court of appeals or this court. Petitioner contends that this court should take jurisdiction of this case because the facts as he sees them do not support the trial court's action in granting the railroad's motion for directed verdict. That is not the function of a writ of certiorari in this court. The petition should be denied.

Respectfully submitted,

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